

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,
Plaintiff,
vs.
PHILLIP SMITH, *et al.*,
Defendants.

Case No. 2:11-cr-00058-JAD-CWH

REPORT AND RECOMMENDATION

This matter was referred to the undersigned magistrate judge on Defendant Phillip Smith's ("Smith") motion to dismiss (ECF No. 208), filed October 15, 2015, the government's response (ECF No. 213), filed November 9, 2015, Smith's reply (ECF No. 214), filed November 13, 2015, and Smith's supplement (ECF No. 218), filed December 1, 2015. The government did not respond to Smith's supplement.

Also before the Court are Defendant Develle Merritte’s (“Merritte”) unopposed motions for joinder to Smith’s motion to dismiss (ECF No. 209), filed October 22, 2015, Smith’s reply (ECF No. 215), filed November 13, 2015, and Smith’s supplement (ECF No. 219), filed December 4, 2015.¹ The government did not respond to Smith’s supplement.

BACKGROUND

Smith and Merritte (collectively “defendants”) are charged by way of a superseding indictment with one count of Conspiracy to Interfere with Commerce by Armed Robbery, in violation of 18

¹ In light of the government's lack of opposition, and good cause appearing, the Court grants Merritte's motions for joinder (ECF Nos. 209, 215, 219).

1 U.S.C. § 1951, thirteen counts of Use of a Firearm During and in Relation to a Crime of Violence, in
2 violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 924(c)(2), and twelve counts of Interference with
3 Commerce by Robbery, in violation of 18 U.S.C. § 1951. *See* ECF No. 53.

4 **DISCUSSION**

5 **1. Legal Standard**

6 Federal Rule of Criminal Procedure 12(b) provides that “any defense, objection, or request that
7 the court can determine without trial on the merits” may be raised by pretrial motion. Fed. R. Crim.
8 P. 12(b)(1). A motion to dismiss is generally capable of determination before trial “if it involves
9 questions of law rather than fact.” *See United States v. Yip*, 248 F. Supp. 2d 970, 972 (D. Haw. 2003)
10 (citing *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986)). The
11 sufficiency of an indictment is judged by “whether the indictment adequately alleges the elements of
12 the offense and fairly informs the defendant of the charge, not whether the Government can prove its
13 case.” *United States v. Buckley*, 689 F.2d 893, 897 (9th Cir. 1982). The indictment itself should be
14 “(1) read as a whole; (2) read to include facts which are necessarily implied; and (3) construed
15 according to common sense.” *Id.* at 899.

16 **2. Analysis**

17 In the instant motion, defendants move to dismiss all counts that allege a violation of 18 U.S.C.
18 § 924(c) for failure to state a claim. Each § 924(c) count provides an additional period of
19 imprisonment for using or carrying a firearm in furtherance of a “crime of violence.” Defendants
20 argue that a Hobbs Act robbery under 18 U.S.C. § 1951 is not a “crime of violence” within the
21 meaning of 18 U.S.C. § 924(c)(3)(a) because robbery can purportedly be committed without the use,
22 attempted use, or threatened use of violent physical force. Defendants note that under the “categorical
23 approach,” an offense qualifies as a crime of violence only if a necessary element of the offense
24 includes the use, attempted use, or threatened use of violent physical force. The U.S. Supreme Court
25 has interpreted the phrase “physical force” in the Armed Career Criminal Act’s (“ACCA”) “force”
26 clause to mean “violent force, that is, force capable of causing physical pain or injury to another
27 person.” *Johnson v. United States*, 559 U.S. 133, 140 (2010). Defendants argue that a violation of the
28 Hobbs Act can occur by putting someone in fear of injury that could have been caused by something

1 other than a defendant's actual or threatened use of violent physical force under 18 U.S.C. §
2 1951(b)(1). Defendants therefore conclude that 18 U.S.C. § 924(c) does not apply because a Hobbs
3 Act robbery is not a "crime of violence." Moreover, defendants argue that the "residual clause" of §
4 924(c) is unconstitutionally vague under *Johnson v. United States*, 135 S. Ct. 2551 (2015), and
5 therefore cannot be a basis for a violation of the Hobbs Act.

6 In response, the government argues that a Hobbs Act robbery qualifies as a crime of violence
7 under § 924(c)(3)(A)'s force clause. The government also argues that the modified categorical
8 approach applies because the Hobbs Act is "divisible" and therefore the Court need not apply the
9 vagueness argument found in *Johnson v. United States*.

10 Defendants, in their reply and supplement, reiterate their earlier assertions.

11 **a. Categorical and Modified Categorical Approaches**

12 As a preliminary matter, the Court notes that the parties have argued the sufficiency of the
13 indictment for an application of the "categorical" and "modified categorical" approaches. The
14 categorical approach has consistently been used by sentencing courts in evaluating a prior
15 conviction—often interpreting a state criminal statute—to determine whether its elements fall within the
16 definition of "crime of violence" in the ACCA. *See generally Descamps v. United States*, 133 S. Ct.
17 2276, 2281 (2013). The categorical approach has also been found applicable to evaluate collateral
18 immigration consequences. *See Rendon v. Holder*, 764 F.3d 1077, 1083 (9th Cir. 2014). However,
19 this Court did not find binding precedent that applied the categorical approach to a § 924(c)
20 indictment.

21 Nevertheless, the U.S. Supreme Court has offered guidance, in *Taylor v. United States*, 495
22 U.S. 575 (1990), by explaining that categorical and modified categorical analyses are a product of the
23 ACCA, 18 U.S.C. § 924(e)(2)(B). The ACCA enhances punishments for persons with three prior
24 convictions involving a violent felony or serious drug offense. *Taylor*, 495 U.S. at 582 (citing 18
25 U.S.C. § 924(e)(1)). In discussing the enhancements provided in § 924, the U.S. Supreme Court
26 concluded that Congress intended the sentencing court to look only to the fact that a defendant had
27 been convicted of crimes falling within certain categories, and not to facts underlying prior
28 convictions. *Id.* at 600. The Supreme Court in *Taylor* explained the practical difficulties and potential

1 unfairness of doing otherwise, particularly in light of the limited record regarding previous offenses
2 before the sentencing court. *Id.* In cases where the government alleges that a defendant's actual
3 conduct would fit the generic definition of a "crime of violence," the trial court would have to
4 determine what that conduct was. *Id.* at 601. In some cases, the indictment or other charging paper
5 might reveal the theory or theories of the case presented to the jury. *Id.* In other cases, however, only
6 the government's actual proof at trial would indicate whether a defendant's conduct constituted a
7 "crime of violence." *Id.* The Supreme Court has therefore concluded that the only plausible
8 interpretation of the enhancement provisions of the ACCA is that "it generally requires the trial court
9 to look only to the fact of conviction and the statutory definition of the prior offense." *Id.* at 602.
10 Based on this Court's review of case law, the analysis in *Taylor* has been uniformly applied by federal
11 courts in determining whether sentencing enhancement statutes are applicable to qualifying offenses
12 of conviction. *See Johnson v. United States*, 135 S.Ct. 2551 (2015) (In finding that the "residual
13 clause" of the ACCA violated the Due Process Clause, the Supreme Court invoked the lessons of
14 *Taylor* to reiterate the utility of the categorical approach.).

15 **b. Categorical Approach Inapplicable**

16 The Court finds nothing to justify an application of the categorical approach in evaluating the
17 sufficiency of the pending indictment. Section 924(c) is not a recidivist statute, and it does not require
18 this Court to make a determination on a prior conviction. Section 924(c) also does not mention prior
19 "convictions," i.e., the language found by the Supreme Court in *Taylor* to indicate a showing of
20 congressional intent that would trigger a sentencing court to view an offense categorically. *See*
21 *Shepard v. United States*, 544 U.S. 13, 23 (2005) (noting that the categorical approach is an "issue of
22 statutory interpretation"); *United States v. Church*, No. 1:15-CR-42-TLS, 2015 WL 7738032, at *5
23 (N.D. Ind. Dec. 1, 2015) (discussion of categorical approach and § 924(c)). The complications
24 surrounding the ACCA do not carry over to § 924(c). In fact, § 924(c) does not criminalize the
25 underlying predicate offense but rather proscribes, as a separate and distinct offense, the use or carry
26 of a firearm during the commission of, or in relation to, the predicate offenses. *See United States v.*
27 *Hunter*, 887 F.2d 1001, 1002 (9th Cir. 1989) (holding that 18 U.S.C. § 924(c) does not require a
28 defendant to be charged with, or convicted of, the underlying offense, so long as the underlying

1 conduct is proven as an element of the firearm charge); *United States v. Hunter*, 887 F.2d 1001, 1003
 2 (9th Cir. 1989) (The Ninth Circuit has “long held [that] section 924(c)(1) defines a separate crime
 3 rather than merely enhancing the punishment for other crimes.”). If the underlying offense need not
 4 be charged, then the sufficiency of the § 924(c) charge itself does not depend upon the “category” of
 5 the underlying offense, and should not be the basis to dismiss the § 924(c) charge.

6 The Court is also not persuaded that the categorical or modified categorical approaches are
 7 applicable when the violent nature of the alleged robberies is apparent from the face of a pending
 8 indictment. To prove a violation of 18 U.S.C. § 924(c)(1)(A), the government must show that
 9 defendants: (1) carried a firearm; (2) committed all the acts necessary to be subject to punishment for
 10 a crime of violence; and (3) carried the gun during and in relation to that crime. *United States v.*
 11 *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999). Because the Hobbs Act robberies, as charged in this
 12 case, include as an essential element, physical violence or a threat of physical violence, there is no
 13 doubt that such an offense would be well within the definition of a “crime of violence” under
 14 § 924(c)(3)(A). *See e.g.* ECF No. 53 (Count one of the superseding indictment states that robbery, as
 15 that term is defined, is “by means of actual and threatened force, physical violence, and fear of injury,
 16 immediate and future.”). A jury will be required in this case to determine whether the necessary
 17 elements have been established beyond a reasonable doubt. Therefore, § 924(c) does not implicate any
 18 of the problems that exist under the ACCA in having to reconstruct, long after an original conviction,
 19 the conduct underlying the predicate offense. Accordingly, defendants’ motion to dismiss is denied
 20 because the face of the indictment sufficiently alleges the elements of the offense, i.e., use of a firearm
 21 during and in relation to a crime of violence.²

ORDER AND RECOMMENDATION

22 Accordingly, **IT IS HEREBY ORDERED** that Merritte’s motions for joinder (ECF Nos. 209,
 23 215, 219) are **granted**.

24 **IT IS FURTHER RECOMMENDED** that defendants’ motion to dismiss (ECF No. 208) be
 25 **denied**.

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 28 ² Because the Court denies defendants’ motion at this juncture, the Court will not address the government’s arguments regarding application of the alternative categorical approach.

1 **NOTICE**

2 This report and recommendation is submitted to the United States District Judge assigned to
3 this case under 28 U.S.C. § 636(b)(1). A party who objects to this report and recommendation may
4 file a written objection supported by points and authorities within fourteen days of being served with
5 this report and recommendation. Local Rule IB 3-2(a). Failure to file a timely objection may waive
6 the right to appeal the District Court's Order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

7 DATED: December 22, 2015

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9 C.W. Hoffman, Jr.
10 United States Magistrate Judge